87-1947

No.

Supreme Court, U.S.
FILED
MAY 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

LOUIS VITALE, GRACE VITALE AND
ANGELO VITALE PETITIONERS,

v.

BENSON A. SNAIDER, GERALD H.
COOPER, WILLIAM F. GALLAGHER,
ALLSTATE INSURANCE COMPANY,
ANDREW P. NEMEROFF AND
JOHN DOE INSURANCE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOUIS VITALE, PRO SE
162 STANDISH AVENUE
NORTH HAVEN, CONN.
(203) 239-3430

QUESTIONS PRESENTED FOR REVIEW

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT SECURING THE FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AGAINST SELECTIVE DISCRIMINATION?

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT ISSUES INVOLVING THE INTERPRETATION UNDER COLOR OF STATE LAW AND STATE ACTION?

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CONSTUTIONS AND STATUTES

LIST OF PARTIES

All the parties in the United States Court of Appeals for the Second Circuit are all listed in the caption.

OPINION BELOW

The opinion of the United States District Courts. (App.B, infra, pps.-1b-8b) is not reported.

The opinion of the United States Court of Appeals for the Second Circuit (App.C, infra, pps.-1c-5c) will not be reported.

JURISDICTION

The jurisdiction of United States District Court was invoked under Title 28 U.S.C. § 1343. (Complaint, para. 2, p-2 and amended complaint, para. 3, p-1). The judgment of said court was entered on July 30, 1987. The Notice of Appeal was filed August 21, 1987 and docket with the clerks office of the United States Court of Appeals for the Second Circuit until September 23, 1987, (App.B, infra, p-8b).

The judgment of this court was entered on March 2, 1988. The notice and supplement

motions for a rehearing was timely filed and was denied on March 22, 1988. (App. C, infra, p.-3c).

The jurisdiction of the Supreme Court of United States was invoked under Title 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Seventh Amendment to the United States Constitution provides in relevant part: (App. D, infra, p.-1d).

2, Fourteenth Amendment of the Constitution of United States provides in relevant part: (App. D, infra, pps. 1d-2d).

3. Section 1983 of the Civil Rights Act provides in relevant part: (App.D infra,p-2d)

4. Section 1985(2)(3) of the Civil Rights Act provides in relevant part: (App. D, infra, pps. 2d-3d).

5. Section 1986 of the Civil Rights Act provides in relevant part: (App.D,infra,p-4d)

6. Rule 15, Fed. R. Civ. P., 28 U.S.C., for amendments and supplements in the comp-

plaints provides in relevant part: (App. D, infra, par. 7, p. 4d).

7. Rule 8(f), Fed. R. Civ. P., 28 U.S.C. provides in relevant part: (App. D, infra, par. 10, p. 4d).

8. Rules 54(c) and 12, 28 U.S.C., provides in part: (App. D, infra, par. 8, p. 4d).

9. Rule 42(b), Fed. R. Civ. P., 28 U.S.C., provides in part: (App. D, infra, par. 9, p. 4d).

STATEMENT OF THE CASE

Petitioner Louis Vitale was the operator of the vehicle, with petitioners Grace and Angelo Vitale riding as passengers. As we were into the left hand turn of the center divided of the highway, we were struck violently in the rear end of our automobile by a Miss Diane M. Koty. We were all severely injured and the vehicle was badly damaged. Our total expenses to date is $60,000.00, excluding pain and suffering. (Paras. 13-22, pps. -3, 4 of the complaint and paras. 1 thru 12, pps.-4 thru 6 of the Second Count of the amended complaint); See Officer's Barnum po-

lice report, the diagram showing the position of the automobile, p.-2, marked Exh. A attached to p.-1 of MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTION TO DEFENDANT BENSON A. SNAIDER'S AND ALL OTHER DEFENDANTS' MOTION TO DISMISS dated December 17, 1986.

The petitioners hired respondent Snaider to handle our claims against respondent Allstate Insurance Co. Said respondent hired respondents Gerald H. Cooper to handle the lawsuit during the pleadings, trial and post trial and William F. Gallagher for the appeal in the action known as G. Vitale, et al v. Diane M. Koty. (Paras. 4, 23-24, pp. 2 4 of the complaint and paras. 4, 6 thru 9, pp.-1-2 of the First Count of the amended complaint).

In a conspiracy among the respondents Snaider, Cooper and Gallagher with Judges Ronald Fracasse and Lester Aaronson, these conspirators committed various blatant violations concerning constitutional, procedural and improprieties in the courtroom in the present of the jury which resulted in a

verdict against respondents Grace and Angelo Vitale. In the appeal, Judge Antonette I. Duponte ended the case under a frivolous claim of illegal procticing of law against petitioner Louis Vitale by respondent Gallagher. (Paras. 25, Subd. a-g, 26-29, Subd. a-k, 30-37, pps. 4-6, of the First Count of the complaint, and paras. 13-15, Sibd. a-j, 16-18, Subd. a-1, 19-29, pps. 6-10 of the Second Count of the amended complaint).(See: Exhs. B, C, D, E, F, G, H, I, J, K & M of MEMORANDUM supra).

The petitioners filed a pro se lawsuit for fraud and malpractice against respondent Snaider, known as L. Vitale, et al v. Benson A. Snaider in Superior Court of New Haven. Petitioners filed a substitute complaint alleging many allegations in said action, which is attached to MEMORANDUM IN SUPPORT OF DEFENDANT BENSON A. SNAIDER'S MOTION TO DISMISS dated December 12, 1986. Respondent Snaider filed a general denial of all the allegation in his answer to the substitue complaint. (Exh. L attached to MEMORANDUM supra). The

petitioners proved every allegation in our substitute complaint with our hostile witness respondent Snaider, Cooper and Gallagher and because of the flagrant violations of our constitutional, procedural and improprieties in the courtroom, the jury brought in a verdict against us. (See: Exh. N attached to MEMORANDUM supra).(paras. 1-13, Subd. a-j, 14-18, opps.6-8 of the Second Count, paras. 1-5, pps.8-9 of the Third Count of the complaint and paras. 1-12, Subd. a-1, 13-16, pps. 10-13 of the amended complaint). Respondent Snaider's untrue response to all the allegation in our substitute complaint, petitioners filed a Motion for cost. (Exh. P attached to MEMORANDUM supra).

On October 15, 1986, the petitioners filed a civil rights lawsuit in the United States District Court in New Haven under the Fourteenth Amendment Due Process and Equal Protection Laws of the Constitution of the United States, and under federal law, particularly the Civil Rights Act, Title 42 U.S.C., Sections 1983, 1985(3) and 1986. The

petitioners hàndle our lawsuit pro se and the respondents were all represented by attorneys.

Respondent Andrew P. Nemeroff filed his Motion to Dismiss Plaintiffs' Complaint on October 22, 1986. All other respondent incorporated said motion in lieu of filing their own brief. Respondent's distortion of the facts as "contemptuous conclusary allegations" and various claims of laws, was answered in petitioners' Objection to Defendant's Motion to Dismiss Plaintiffs' Complaint dated October 27, 1986, with attached Exhs. A, B, C, D, E & F and a Memorandum of Law. (pps. 1-4 and pps. 1-2 of the Memorandum). Said respondent was the only one to object to petitioners' Motion to Amend which was denied without prejudice by Judge Burns. (App.A, infra, p-1a).

Respondent Snaider incorporated Nemeroff's Motion to Dismiss and, in addition, his own Memorandum in Further Support of his own Motion to Dismiss claiming res judicata based on an infirm judgment in Vitale, et al v. Snaider The Supreme Court has held that a § 1783, re-

quires that a judgment must comport with due process of a fair and impartial trial under Fourteenth Amendment of the Constitution of the United States for state and federal courts to give a state court judgment with both issue and claim preclusive effect in a subsequent action under 42 U.S.C. § 1983. Kremer v. Chemical Construction Corp., 102 S.Ct 1883, 1897, 456 U.S. 461, 481-82; Montano v. United States, 440 U.S. 147, at 164n-11 (1979; Trainor v. Hernandy, 431 U.S. 435, 467. Haring v. Prosise, 462 U.S. 306, 667 F.2d 1133, affirmed, pps-317-323 (1983). (App.E, infra, paras. 10, 11 & 12, pps-3d-4d); (App.D, infra, paras.-2-3, pps-2d-3d). The judgment against petitioners is infirm judgment because Judge Reynolds ordering three separate trials, with one charge to the jury and sua sponte decision that petitioners did not prove fraud, violated our right to a jury trial under the Seventh Amendment. (App.D, infra, p.-1d).

In Judge Burn's ruling on repondents' Motion to Dismiss Plaintiffs' Complaint against

the petitioners was riddle with factual errors She flatly ignored many precedents, and by reading our complaint as narrowly as possible and drawing every inference adverse to our claim. Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391, (1975). See Stark v. Perloff Bros. Inc, 760 F.2d 52 (1985);(Br. of Appellants, pps. 8-9); Rule 8 (f), Fed. R. Civ P., 28 U.S.C.A. Whether or not our pleadings had informalities, a pro se pleadings in motions must be read liberally and a court has discretion to tolerate imformalities by pro se litigant. Bullock v. Sweeney, 644 F. Supp 507, (1986). In dismissing our complaint, she denied us an opportunity to amend the complaint under the rule and decisions by the court. Rule 15, Fed. R. Civ. P. 28 U.S.C.A. (app.D, paras, 7-10, p-4d). The precedents involved (App.E, infra paras.-1-4, p.-1e, para. 7, p-3e). That federal courts have limited jurisdiction and an extension of the state courts, Judge Burns should have used her discretion by reversing the infirm judgment in Vitale, et al v. Snaider, in view of Exhs. A-F

Objection to Defendant's Motion to Dismiss, p-6, supra. (App.E, infra, paras. 8-9, p-3e).

Petitioners appeal to the United States Court of Appeals for the Second Circuit. (App.B, infra, p-5b). After filing of all briefs, reply brief and arguments before the court, Judges Timber, Kearse and Mahoney affirmed the Judgment of Judge Burns with a foot note that the decision will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court. This warning to the bar would indicate that the decision is wrongfully and selective for this case only because we were pro se petitioners. (App.C, infra, pps-1c-3c). We could not believe that these judges could approve the subversion of the integrity of the state judicial system instead of accept our case which Congress intended a federal remedy under three circumstances. Monroe v. Pope, 365 U.S. 167, 81 S.Ct 473, 5 L.Ed 492. (App.E, infra, para. 9, p-3e). (Reply Br. of Appellants, p-10). Especially, that corruption of the courts

undermines the very foundation of our society. (App.D, infra, p-2d). There be no equal justice where the kind of a trial a man gets on whether he is represented by a member of the legal profession, a result which should be impossible under the Constitution whose Preamble recognizes the great purposes of our society to "establish justice" and to "secure the blessing of liberty."

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT SECURING THE FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AGAINST SELECTIVE DISCRIMINATION

The public importance and far-ranging effect of the Fourteenth Amendment issue is clear. The United States Court of Appeals' Judgment offend due process and equal protection clauses because the footnote in the judgment is to be used only against the petitioners. (App.C, infra, p-3c); (App.D, infra, para 2, pp-1d-2d). This selective decision is only possible because the judges are prejudice against pro se petitioners. Due process and equal protection clauses, the court must

ensure that no matter who the parties are in the case, when parties find themselves in a situation similar to those parties in prior cases they will be treated by the law in the same way. (App.D, infra, para.-4, pp.-2d-3d). The refusal of the state courts to protect our constitutional rights, Congress had intended a federal remedy where the state refused to protect a litigant's constitutional protective rights. (App.E, infra, para.-9, p-3e). A court that is bias and prejudice against a party in a trial is not a fair trial. (App.E, infra, paras.-3-4, p-1e). Due process of law is denied if a trial is conducted in such a manner that it is shocking to the universal sense of justice or offensive to the common and fundamental ideas of fairness and right. Belt v. Brady, 316 U.S. 455, 475 (1941).

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT ISSUES INVOLVING THE INTERPRETATION UNDER COLOR OF STATE LAW AND STATE ACTION

This case presents the same issues and is like Tower v. Glover, 104 S.Ct. 2829 (1984) and should have been decided on the same

principle. See: Lugar v. Edmondson oil co. 457 U.S. 922 (1982); Dennis v. Sparks, 449 U.S. 24, 101 S.Ct 183, 66 L.Ed2d 185, at page 2824: (App.E, infra, paras.-5-6, p-2e). Also see: Cameron v. Fogarty, C.A.2d 1983, 705 F.2d 676; Franko v. LaValle, C.A.2d 1976, 535 F.2d 1346, cert. denied, 97 S.Ct. 310, 429 U.S. 918, 50 L.Ed 284; Angola v. Civiletti, C.A.2d 1981, 666 F.2d 1, 4. (App.E, infra, p-1e).

CONCLUSION

This appeal presents a substantial question of public importance. In view of the invidious discriminatory selective decision because the petitioners are pro se does offend the due process and equal protection clauses of the Constitution of the United States is a violation of their oath to treat all citizens a like. When I, petitioner Louis Vitale, leaving a wife and two infant children, voluntary enlisted in the army during W.W.II, I took an oath to defend and protect the Constitution, equally for all citizens of the Unity States.

Certiorari should be granted.

Respectfully submitted,

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PETITIONER PRO SE

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HAMDEN, CONN.

PETITIONER PRO SE

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LOUIS VITALE, ET AL : NO. 86-362 (EBB)

VS. :

BENSON A. SNAIDER, ET AL: NOVEMBER 14, 1986

PLAINTIFFS' MOTION TO AMEND COMPLAINT

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure for the United States District Court, District of Connecticut.

Plaintiffs Louis Vitale, Grace Vitale and Angelo Vitale moves to amend the complaint to to clarify some of the allegations and technical requirements as to form required under Title 42, Sections 1983, 1985(3) and 1986. This motion was denied without prejudice on December 17, 1986.

PLAINTIFFS

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APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LOUIS VITALE, ET AL : NO. 86-362 (EBB)

VS. :

BENSON A SNAIDER, ET AL : JULY 29, 1987

RULING ON MOTION TO DISMISS

Ruling on the Motion to Dismiss by the United States District Court in New Haven, as follows:

> Plaintiff, proceeding pro se, brought this action alleging various violations of their constitutional rights in connection with a series of Connecticut state court proceedings. The named defendants are all attorneys and/or parties involved in the state court cases. The plaintiffs purport to state causes of action against these defendants under 42 U.S.C. §§ 1983, 1985(3) and 1986. Each of the defendants has moved to dismiss the complaint for failure to state a claim. For the reasons discussed below, the motions to dismiss must be granted.

The pertinent facts as alleged in the complaint appear to be as follows. In May, 1980, the plaintiffs were involved in an automobile accident with an individual by the name of Diane Koty. Plaintiffs maintain that they were "severely injured" in the accident and that their automobile was "badly damaged". The plaintiffs retained defendant Benson A. Snaider to represent them in a lawsuit regarding the accident.

In February, 1981, the plaintiffs filed a three count complaint against Koty in Connecticut Superior Court. Defendant Gerald H. Cooper was retained by defendant Allstate Insurance Company to represent Koty. Shortly after the trial commenced in October, 1984, the third count of the complaint stating a cause of action on behalf of plaintiff Louis Vitale was withdrawn. The jury ultimately returned a verdict in favor of Koty. The plaintiffs thereafter took a pro se appeal to the Connecticut Appellate Court in which defendant

William Gallagher was retained to represent Allstate. In June, 1985, the appeal was dismissed and motions to reargue were denied in July, 1985.

In November, 1985, plaintiffs filed a pro se complaint against Snaider in Connecticut Superior Court alleging fraud and malpractice. Defendant Andrew Nemiroff was retained to represent Snaider. The case went to trial in September, 1986. A jury verdict was returned in favor of Snaider in October, 1986.

On October 16, 1986, plaintiffs filed the instant complaint in this court. They apparently assert that the named defendants conspired with various judicial officers in the course of the state court proceedings to deny plaintiffs due process and equal protection. The complaint refers to various incidents which plaintiffs maintain amount to violations of their constitutional rights.

To state a claim under § 1983, plaintiffs must allege first, that the defendants

deprived them of a federal right and second that the defendants acted under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1979). Generally, a pro se complaint is held to less stringent standards than other pleadings. Haines v. Sargent, 388 F. Supp. 445, 450 (D. Mass. 1975); Reilly v. Leonard, 459 F. Supp. 291, 300-01 (D. Conn. 1978).

In this action, plaintiffs have named as defendants a number of attorneys who were involved in the various state court proceedings. In their capacity as representatives of clients in court, private counsel do not act under color of state law within the meaning of the Civil Rights Act. See Dahlberg v. Becker, 748 F.2d 85, 89 (2d Cir. 1984), cert. denied, 105 S. Ct. 1845 (1985); McCord v. Bailey, 636 F.2d 606, 613, cert. denied, 451 U.S. 983 (D.C. Cir. 1980). Here, the factual allegations relate solely to actions of the attorneys undertaken in the course of representing their clients. Therefore, plaintiffs have

not alleged the requisite state action. Moreover, none of the facts alleged by plaintiffs, even if taken as true, amount to a deprivation of any constitutional right. Accordingly, plaintiffs' § 1983 claim must be dismissed.

With respect to plaintiffs' claim under § 1985(3), and the drivative claim under § 1986, it is clear that plaintiffs must allege a "class-based, invidiously discriminatory animus" on the part of the defendants. Griffin v. Breckenridge, 403 U.S 88, 102 (1971). Plaintiffs have submitted a proposed amended complaint in which they attempt to make such an allegation. Once again, however, there must be some factual support for the allegation. Having reviewed the complaint, the court concludes that there is no factual support for plaintiffs' claims under § 1985(3) and § 1986. Accordingly, these claims must also be dismissed.

For the foregoing reasons, the motions of all the defendants to dismiss the complaint are granted.

SO ORDERED.

ELLEN BREE BURNS
ELLEN BREE BURNS
UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 29th day of July, 1987.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LOUIS VITALE, GRACE VITALE and ANGELO VITALE	)	
v.	)	
BENSON A. SNAIDER, GERALD H. COOPER, WILLIAM F. GALLAGHER, ALLSTATE INSURANCE COMPANY, ANDREW P. NEMEROFF and JOHN DOE INSURANCE COMPANY	)	NO. 86-362 (EBB)

J U D G M E N T

This cause came on for consideration on defendants' motion to dismiss before the Honorable Ellen B. Burns, United States District Judge, and the issues having duly considered and a Ruling on Motions to Dismiss having been filed on July 29, 1987, granting said motions.

It is ORDERED, ADJUDGED and DECREED that judgment is hereby entered in favor of the dedefendants dismissing the complaint.

Dated at New Haven, Connecticut, July 30, 1987.

KEVIN F. ROWE, CLERK
U. S. D. C.

BY FRANCES J. CONSIGLO
DEPUTY IN CHARGE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LOUIS VITALE, ET AL : NO. 86-362 (EBB)

VS. :

BENSON A. SNAIDER, ET AL : AUGUST 17, 1987

NOTICE FOR AN APPEAL

Notice is hereby given that Plaintiffs Louis Vitale, Grace Vitale and Angelo Vitale hereby appeals to the United States Court of Appeals for the Second Circuit from a final judgment entered in the above-entitled action on July 30, 1987.

August 17, 1987

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APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on February 18, 1988.

Present:

HONORABLE WILLIAM H. TIMBERS

HONORABLE AMALYA L. KEARSE

HONORABLE J. DANIEL MAHONEY

CIRCUIT JUDGES,

LOUIS VITALE, GRACE VITALE and ANGELO VITALE Plaintiffs-Appellants, v. BENSON A. SNAIDER, GERALD H. COOPER, WILLIAM F. GALLAGHER, ALLSTATE INSURANCE COMPANY, ANDREW P. NEMEROFF and JOHN DOE INSURANCE COMPANY Defendants-Appellees.	February 19,1988 No. 87-7808

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecti-

cut and was argued by counsel for appellees and by appellant Louis Vitale pro se.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Burn's Ruling on Motion to Dismiss dated July 29, 1987. Plaintiffs' attempt to allege state action by asserting that the named defendants conspired with, state court judges was insufficient because there was no allegation that the judges acted beyond their subject matter jurisdiction, see, e.g., Green v. Maraio, 722 F. 2d 1013, 1017 (2d Cir. 1983), and because "(d)iffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977). Here, the specific allegations merely chronical state court rulings and findings that were adverse to plaintiffs' interest; hence, the allegations were insufficient to plead conspiracy.

The district court's denial of plaintiffs'

motion to amend their complaint provides no basis for reversal since the proposed amended complaint suffers from the same defects as the original complaint.

We have considered all the plaintiffs arguments in their support of this appeal and have found them to be without merit.

The judgment of the district court is affirmed.

WILLIAM H. TIMBER, U.S.C.J.

AMALYA L. KEARSE, U.S.C.J.

J. DANIEL MAHONEY, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

ISSUED AS A MANDATE:
MARCH 2, 1988

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LOUIS VITALE, ET AL : NO. 87-7808

VS. :

BENSON A. SNAIDER, ET AL : FEBRUARY 23, 1988

NOTICE OF MOTION FOR A REHEARING
OR RECONSIDERATION

BREIF STATEMENT OF THE RELIEF REQUESTED: That this court ruling affirming Judge Burn's for appellee-defendants' Motion to Dismiss the appellant-plaintiffs' complaint on the ground that "In their capacity as representatives of a client in court, private counsel do not act "under color" of state law within the meaning of the Civil Rights Act be reversed and permit us to proceed in a trial in the United States District Court because we have a viable action.

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied, March 22, 1988.

WILLIAM H. TIMBERS CJ

AMALYA L. KEARSE CJ

J DANIEL MAHONEY CJ

UNITED STATES COURT OF APPEALS

DISTRICT OF CONNECTICUT

LOUIS VITALE, ET AL : NO. 87-7808

VS. :

BENSON A. SNAIDER, ET AL : MARCH 9, 1988

NOTICE OF MOTION FOR A SUPPLEMENT TO MOTION FOR A REHEARING OR RECONSIDERATION OF JUDGMENT FEBRUARY 23, 1988

BREIF STATEMENT OF THE RELIEF REQUESTED: That the word "RECONSIDERATION" be deleted and the motion be read as "NOTICE OF MOTION FOR A REHEARING OF THE AFFIRMED JUDGMENT" which is in conflict with the Supreme Court decision in TOWER v. GLOVER, LUGAR v. EDMONDSON OIL CO. F.R.CIV.P. as to AMENDING THE COMPLAINT, within the Federal District Court as to many other laws pertaining to a pro se seeking justice under this viable action.

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied March 22, 1988.

WILLIAM H. TIMBERS CJ

AMALYA L. KEARSE CJ

J. DANIEL MAHONEY CJ

APPENDIX D

CONSTITUTION AND STATUTES INVOLVED

1. The Seventh Amendment to the U.S. Constitution provides in relevant part:

> "A trial before a jury of his peers in the present and under the superintendence of a judge empowered to instruct them with the law and to advise them on the facts, and to set aside their verdict if in his opinion it is against the law or the evidence." Capital Traction Co. v. Hof, 174 U.S. 1, 13, 19 S.Ct. 580, 43 L.Ed 873. The jury is a tribunal which is regarded by the law as one especially fitted to decide controverted questions of fact upon the evidence. They decide the credibility of each witness and if the verdict to which they have agreed is a conclusion to which an honest jury acting fairly and intelligently, than the verdict is final and can not be disturb. If the trial judge should set it aside would be invading the province of the jury which would be depriving a litigant of a jury trial. It is only when the verdict is manifestly and pabably against the evidence in the case, so much, as to indicate that the jury was swayed by passion, by ignorant, partiality or corruption that it should be set aside and a new trial be granted.

2. The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due

process of law; nor deny to any person within its jurisdiction the equal protection of the law;"

The amendment was adopted to prevent the state or its agents from violations of their citizens constitutional protective rights.

> "The due process law is denied if a trial is conducted in such a manner that is "shocking to the universal sense of justice" or "offensive to the common and fundamental ideas of fairness and right."
>
> "Under equal protection deprivation, private persons, jointly engaged with state officials in a prohibited action, are acting "under color" of law for the purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a wilfull participant in a joint activity with the State or its agents.

3. Section 1983, Title 42 U.S.C. of the Civil Rights Act, provides:

> "Every person who, "under color" of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to to subjected, any citizen of the United States or other person within the jurisdiction thereof to the rights, privileges or immunities secured by the constitution and laws shall be liable to the parties injured in an action at law, suit in equity or other proper proceeding for redress."

4. Section 1985, Title 42 U.S.C.A. sets forth various civil conspiracies with only two which we are here concerned, which are

the following, Subd. (2):

"defines a conspiracy to "impede justice" with intent to deny a citizen the equal protection of the law." Subd. (3):

"defines the conspiracy to deprive a person or class of persons of the equal protection of the law or equal privileges and immunities under the laws."

It thus appears that under § 1985(2), the element of a cause of action, are:

1. the defendants conspired;
2. that the purpose of the conspiracy was to impede, hinder or obstruct or defeat the due course of justice in a state or territory;
3. with the purposeful intent to deny to a citizen the equal protection of the law; and
4. that the acts complained of that were done "under color" of state law or authority.

The requirement of § 1985(3), is:

"that by acts done in furtherance of the conspiracy, that the plaintiff was injured in his person or property, or was deprived of having a right or privilege of a citizen of the United States"

5. Canon 1, Code of Professional Responsibility, Section DR 1-102, provides in part:

"An attorney should not attempt to do, is exonerate himself from limiting his liability to his client for his personal malpractice."

6. Canon 7, Code of Professional Responsibility, Section DR 7-102, provides in part:

Par. 5 "knowingly make false statements of law or fact."

7. Rule 15, Fed. R. Civ. P. allow for amendments or supplement amendments were no responsive pleading has been filed. A Motion to Dismiss is not a responsive pleading. 28 U.S.C.A.

8. Under Rules 54(c) and 12, the long accepted meaning is:

> "a district court should not grant a Rule 12(b)(6) Motion to Dismiss for failure to seek the appropriate remedy when the availability of some relief is readily apparent on the face of the complaint."

9. Under Rule 42(b), Fed. R. Civ. P., 28 U.S.C.A. provides:

> "that there be no separate trials of issues of liability and damages where the question of damages is so interwoven with that of liability that the issues can not be submitted to a jury independly without confusing and uncertainty which would amount to a deprivation of a fair trial."

10. Under Rule 8(f), Fed. R. Civ. P., 28 U.S.C.A. provides:

> "mandate that the pleading shall be so construed as to do substantial justice. Therefore, the overly restrictive reading of the complaint is inconsistent under Rule 8(f)."

11. Section 1986 is a derivative of 1985(2) and (3). If there is no civil rights violation of 1985(2)(3), there is none for 1986.

APPENDIX E

PRECEDENTS INVOLVED

1. Cameron v. Fogarty, C.A.2d 1983, 705 F. 676, the U.S. Court of Appeals quote:

> "A pro se complaint alleging, inter alia, that his attorney conspired with judge and counsel denying him his right to adequate legal representation and a fair trial adequately alleges the denial of his rights based on "state action" for the purposes of § 1983, even if the judge is immune for liability for his part in the conspiracy." Franko v. LaValle, C.A.2d 1976, 535 F.2d 1346, cert. denied, 97 S.Ct. 310, 429 U.S. 918, 50 L.Ed 284.

2. Angola v. Civiletti, C.A.2d 1981, 666 F.2d 1, 4, U.S. Court of Appeals, quote:

> "That a claim of a conspiracy to violate a civil right in a plaintiff's complaint is sufficient to meet the requirement concerning detail fact pleading under equal protection clause." Slotnick v. Starsky, C.A.1st 1977, 560 F.2d 31, cert. denied, 98 S.Ct. 1268, 434 U.S. 1077, 55 L.Ed.2d 783.

3. Martinez v. Winner, 548 F.2d 278 (1982) provides in part, concerning due process, is

> "It has been long recognized that the essential element of due process is the freedom of the tribunal from bias or prejudice." In re Murchinson, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed 942 (1955).

4. Miller v. U.S., 120 F.2d 968, 973, that a "fair trial" under the constitution:

> "The bars which guard the rights to a fair trial, such as, guaranteed by the constitution includes court procedure rules of evidence and proper instruc-

tion to the jury."

5. This case is like Tower v. Glover, 104 S.Ct 2820 (1984), and should have been decided on the same principles applied in that case. In that action, the public defender for Glover violated his constitutional protective rights by conspiring with various public officials, such as, appellate judge, state judges and attorney-general for the state in violation of the Civil Rights Act. Supreme Court Justice O'Conner, said:

a) the complaint adequately alleged conduct "under color" of state law in view of the conspiracy allegation; and
b) public defenders are not immune from liability under § 1983 for intentional misconduct by virtue of the alleged conspiratorial actions with state officials which deprive their clients of federal rights; and
c) that in this country the public defender only 19th-century counterpart was a privately retained lawyer, and such a lawyer would never have enjoyed immunity from tort liability for intentional misconduct such as allegedly involved here. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct 183, 66 L.Ed2d 185, at page-2824.

6. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), held:

"That conduct which constitutes "state action" for the purposes of the 14th Amendment due process clause, is also conduct "under color" of state law for the purpose of § 1983 action."

7. Holmes v. Goldin, 615 F.2d 83, 2d Cir. 1980, held:

> "A pro se plaintiff, particularly, one bring a civil rights action, should be afforded an opportunity to fairly and freely amend his complaint." See Owens v. Haas, 2d. Cir. 1979, 601 F.2d 1242.

8. Small Co. v. Lamborn & Co., 267 U.S. at page 254, the court held:

> "Where the evidence is undisputed or of such conclusive character that a verdict was returned for one party, whether plaintiff or defendant, it has to be set aside in the exercise of a sound discretion, a verdict should be directed for the other party"

9. Monroe v. Pope, 365 U.S. 167, 81 S.CT. 473, 5 L.Ed2d 492 (1961), the court held:

> "That Congress had intended a federal remedy in three circumstances: a) where states substance law was facially unconstitutional; b) where state procedural law though inadequate to allow full litigation of a constitutional claim; and c) where state procedural law though adequate in theory was inadequate in practice. In short, the federal courts could step in where state courts were unable or unwilling to protect federal rights of its citizens."

10. Kremer v. Chemical Construction Corp., 102 S.Ct 1883, 1897, 456 U.S. 461, 481-82, on a claim res judicata, the Court held:

> "Redetermination of issues is warranted if there is reason to doubt the quality extensiveness or fairness of procedures followed in prior litigations." Montano v. United States, 440 U.S. 147, at 164 n 11 (1979).

11. Haring v. Prosise, 462 U.S. 306, 667 F.2d 1133, affirmed, pages 317-323 (1983) concerning res judicata, the Court held:

> "A state may not grant preclusive effect in its own courts to a constitutionally infirm judgment and other states and federal courts are not required to accord full, faith and credit to such a judgment, Section 1738 does not suggest otherwise."

Lee v. City of Peoria, 685 F.2d 196 at 201.

12. Trainor v. Hernandy, 431 U.S. 435, 467, concerning claim res judicata, the Court held:

> "When a state procedure is challenged, an adequate forum must be one that is sufficiently independant of the alleged unconstitutional procedure, to judge it impartially, if not, to provide prompt relief if the procedure is found wanting."

13. Gordon v. Luke, 574 F.2d 1147, 99 S.Ct 464, 439 U.S. 970, 58 L.Ed2d 431 (1978) held

> "A pleading should not be scrutinized with such technical niciety that a meritorious claim should not be defeated, and even if claim insufficient in substance, it may be amended to achieve justice."

Supreme Court, U.S.
FILED
JUN 23 1988
JOSEPH E. SPANIOL, JR.
CLERK

NO. 87-1947

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LOUIS VITALE, GRACE VITALE AND ANGELO VITALE

Petitioners

BENSON A. SNAIDER, GERALD H. COOPER, WILLIAM F. GALLAGHER, ALLSTATE INSURANCE COMPANY, ANDREW P. NEMIROFF AND JOHN DOE INSURANCE COMPANY

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF THE CASE

Plaintiffs, proceeding pro se, brought this action alleging various violations of their constitutional rights in connection with a series of state court proceedings. The named defendants are all attorneys and/or parties involved in the state court cases. The plaintiffs have petitioned for a Writ of Certiorari following the affirmance by the Second Circuit Court of Appeals of a ruling by Judge Ellen Bree Burns of the District of Connecticut which granted motions to dismiss filed by defendants Benson A. Snaider, Andrew P. Nemiroff, Gerald H. Cooper and Allstate Insurance Company.

The pertinent facts as alleged in the complaint are as follows. On May 9,

1980, the plaintiffs were involved in an automobile accident in Bridgeport, Connecticut. Plaintiffs Grace and Angelo Vitale were passengers in a motor vehicle driven by plaintiff Louis Vitale. Shortly thereafter, Attorney Benson A. Snaider was retained by the plaintiffs to represent them in a personal injury action brought against the driver of the other vehicle, Ms. Diane M. Koty.

On February 11, 1981, plaintiffs asserted a cause of action against Ms. Koty in a three count complaint drafted by Attorney Snaider, Vitale, et al. v. Koty, New Haven Superior Court, Docket Number 190929. Defendant Gerald H. Cooper was retained by defendant Allstate Insurance Company to represent Ms. Koty. Shortly after the trial

began, on October 16, 1984, the third count of the complaint stating a cause of action for Louis Vitale was withdrawn. A jury trial was held and verdicts were rendered on October 17, 1984 against plaintiffs Grace and Angelo Vitale. Attorney Snaider was permitted to withdraw from Vitale, et al. v. Koty. A plethora of pro se post-trial motions was filed by the various plaintiffs, all of which were eventually denied or dismissed.

Plaintiffs took a pro se appeal of Vitale, et al. v. Koty to the Connecticut Appellate Court. Defendant William F. Gallagher was retained by Defendant Allstate Insurance Company to represent Ms. Koty in the appellate proceedings. On June 6, 1985, the Connecticut Appellate Court dismissed

the appeal of Vitale, et al. v. Koty.

Plaintiffs filed motions with the Connecticut Appellate Court to reargue the dismissal of their appeal of Vitale, et al. v. Koty. Plaintiffs Grace and Angelo Vitale asserted violations of their due process and equal protection rights under the United States Constitution and the Connecticut State Constitution. Plaintiffs' motions to reargue were denied on July 10, 1985.

On November 19, 1985, plaintiffs filed a pro se malpractice and fraud complaint against defendant Snaider in the Connecticut Superior Court for the Judicial District of New Haven at New Haven, Vitale, et al. v. Snaider, Docket Number CV 85-0241362. Attorney Andrew P. Nemiroff, also a defendant in the present action, was retained to

represent defendant Snaider.

Verdicts were returned in the state court action for defendant Snaider on all counts on October 6, 1986 after a twenty-one day trial. On October 8, 1986, plaintiffs filed a combined Motion to Set Aside the Verdict, Petition for a New Trial, and Motion for Costs, all of which were denied.

On October 16, 1986, plaintiffs filed the instant federal litigation, Vitale, et al. v. Snaider, et al., Civil Action N-86-362, in the United States District Court for the District of Connecticut alleging the same facts and seeking the same relief as in the state court action. The complaint asserts that the named defendants conspired with various judicial officers in the course of the state court proceedings to deny

plaintiffs due process and equal protection.

On July 23, 1986, Judge Burns granted motions to dismiss filed by defendants Benson A. Snaider, Andrew P. Nemiroff, Gerald H. Cooper and Allstate Insurance Company, holding that the plaintiffs failed to state a cause of action under §§1983, 1985(3) and 1986 of the Civil Rights Act. Judgment entered in favor of the defendants, and plaintiffs then filed an appeal to the Second Circuit Court of Appeals.

On February 19, 1988, the Second Circuit Court of Appeals affirmed Judge Burns' ruling, substantially for the reasons stated in Judge Burns' Ruling on Motion to Dismiss. Plaintiffs then filed the instant petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS BELOW NEITHER CONFLICT WITH DECISIONS OF THIS COURT NOR CREATE A CONFLICT AMONG THE CIRCUITS

It is axiomatic that a petition for certiorari will not be granted merely on a showing that the decision of the court below was incorrect:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgmts.'... If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and

> statutory responsibilities placed upon the Court.
>
> Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi, reprinted in Stern and Gressman, Supreme Court Practice, at pp. 258-59 (5th ed. 1978).

In the same vein, Chief Justice Taft observed:

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.
>
> Magnum Co. v. Coty, 262 U.S. 159, 163 (1923).

See also Dick v. New York Life Insurance Company, 359 U.S. 437, 452-55 (1959) (Frankfurter, J., dissenting). These sentiments have now been codified in Rule 17 of the Supreme Court Rules,

which stipulates that a review on writ of certiorari "is not a matter of right," and will be granted "only where there are special and important reasons therefor."

In addition to re-arguing the merits, the present petitioners have urged two reasons for granting the writ. They claim that the decisions below are inconsistent with decisions of this Court (1) securing Fourteenth Amendment Rights to due process and equal protection and (2) involving interpretation of "under color of state law and state action." Both of these claims are without merit, and the petition should be denied.

I

Where a petition for a writ of certiorari is sought on the ground of

conflict between the circuits or between the lower court opinion and an opinion of the Supreme Court, the petitioner must demonstrate that there is a "real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Stern and Gressman, Supreme Court Practice, op cit. at 264. Where the alleged conflict is not a true conflict on precisely the same question, the petition for certiorari is "but one way of saying that the decision below is wrong in light of general principles." Id. at 265. This is not a sufficient reason for granting the writ. Indeed, the Court will dismiss a writ of certiorari as improvidently granted where subsequent examination reveals that the alleged conflict did not in

fact exist. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 392-93 (1923); Keller v. Adams-Campbell Co., 264 U.S. 314, 319-20 (1924); Wisconsin Electric Co. v. Dunmore Co., 282 U.S. 813, 813 (1931); Sanchez v. Borras, 283 U.S. 798, 799 (1931).

To warrant the issuance of a writ of certiorari, the claimed conflict must be a direct one:

> Lawyers, of course, are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine; that is what makes the ruling below "erroneous." But such a loose reading of the [Rule 17] concept of a decision "in conflict with applicable decisions of this court" does not satisfy the Supreme Court's understanding of what constitutes a conflict, and will not be sufficient to obtain a grant of certiorari. A true conflict, in other words, must be direct and irreconcilable, and must be demonstrably so.

Stern and
Gressman, op cit.
at p. 273.
(emphasis supplied).

This requirement of a direct conflict has become even more stringent under the present Supreme Court Rules. While the former Rule 38(5)(b) required only a showing that the decision of the Court of Appeals was "probably" in conflict with a Supreme Court opinion, the present Rule 17.1(c) has eliminated the word "probably." It is evident from the cases cited in their petition that petitioners have failed to meet this exacting standard.

Petitioners have in no way explained how the decisions below are in conflict with the cases cited in their brief, nor have petitioners elaborated in any way

on the facts or the law of those cases.

Even a cursory review of the cases cited by the petitioners in support of their argument that the decisions of the courts below are in conflict with decisions of this Court demonstrate the absence of any direct conflict. The cases cited at pages 12-13 of the petition are not in conflict with the decisions below.

Betts v. Brady, 316 U.S. 455 (1941) is cited on page 12 of petitioners brief for the proposition that due process is denied if a trial is conducted in such a manner that it is shocking to "the universal sense of justice or offensive to the common and fundamental ideas of fairness and right." Id., at 475. Nothing in the decisions below is in conflict with the general principle

cited by petitioners, which comes from a dissenting opinion by Justice Hugo Black in a case involving the right of an indigent criminal defendant to state-appointed counsel.

Petitioners incorrectly and without elaboration state that Tower v. Glover, 467 U.S. 914 (1984) presents the same issues as the case at bar. Tower v. Glover held that a complaint adequately alleges "state action" by allegations of conspiracy between state officials and state-appointed public defenders. Id., at 920. Judge Burns' decision below held, inter alia, that private counsel do not act "under color of law within the meaning of the Civil Rights Act" in their capacity as representatives of clients in court. First, such a holding is not in conflict with Tower v.

Glover. Second, Judge Burns' decision also held that petitioners' complaint failed to allege any deprivation of a constitutional right. Petitioners' Appendix B, at 5b. Third, the Second Circuit Court of Appeals held that petitioners' "[d]iffuse and expansive allegations" are insufficient to state a cause of action for conspiracy, and "merely chronicle state court rulings and findings that were adverse to plaintiffs' interest." Petitioners Appendix C, at 2c.

Accordingly, the petitioners have failed to demonstrate any conflict between the decisions by Judge Burns and the Second Circuit below and the decisions of this Court. Therefore, the petition should be denied.

II. THE PETITION DOES NOT PRESENT ISSUES OF NATIONAL IMPORTANCE

Even if there were a "true" conflict in the present case, that does not guarantee that the Court will issue the writ:

> The Court as a whole now seems committed to giving the existence of a conflict less than decisive weight.
>
> * * *
>
> The importance and recurring nature of the issue in conflict often plays a decisive role in the grant or denial of certiorari.
>
> Stern and Gressman, op cit. at 269-70

Thus Chief Justice Vinson admonished:

> To remain effective the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.
>
> Address of Chief Justice Vinson

before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi, reprinted in Stern and Gressman, op cit. at 259. (emphasis supplied).

Petitioners have not even attempted to argue that the issues raised in the present case meet Chief Justice Vinson's test. In assessing the national significance of the present petition, it must be emphasized that petitioners are merely rearguing the merits of their original and legally insufficient complaint dismissed in the Federal District Court below. There is no issue of national significance which will have immediate importance beyond the facts and parties involved here.

Petitioners assert that they have been denied their day in court. A

review of the events leading up to this petition reveals that petitioners have already had their day in court. Indeed, petitioners kept the defendant Benson Snaider in court throughout a 21 day trial. Plaintiffs' present petition amounts to nothing more than an attempt to re-try the issues decided in that state court action. That is clearly not the purpose of the writ of certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June ~~24~~ 22, 1988